

IN THE UNITED STATES DISTRICT COURT
FOR THE NORHTERN DISRICT OF ALABAMA
SOUTHERN DIVISION

PEOPLE FIRST OF ALABAMA, ROBERT)
CLOPTON, ERIC PEEBLES, HOWARD)
PORTER, JR. ANNIE CAROLYN)
THOMPSON, GREATER BIRMINGHAM)
MINISTRIES, ALABAMA STATE)
CONFERENCE OF THE NAACP, BLACK)
VOTERS MATTER CAPACITY)
BUILDING INSTITUTE, TERESA)
BETTIS, SHERYL THREADGILL-)
MATTHEWS, and GREGORY BENTLEY,)

Case No. 2:20-cv-00619-AKK

Plaintiffs,)

v.)

JOHN MERRILL, in his official capacity as)
the Secretary of State of Alabama, et al.,)

Defendants.)

TRIAL BRIEF OF DEFENDANTS
FRANK BARGER AND DEBRA KIZER

Defendants Frank Barger and Debra Kizer, the Probate Judge and Absentee Election Manager of Madison County, Alabama, respectively, respectfully submit the following as their trial brief.¹ In support of this motion, Defendants Barger and Kizer state as follows:

¹ At the time of this filing, Defendants Barger and Kizer have on file and pending before this Court a Motion to Dismiss or in the Alternative Motion for Summary Judgment. (Doc.165). The Court has yet to rule on this motion. Defendants do not

I. Adoption of the Brief of the State Defendants

Defendants Barger and Kizer hereby adopt the Trial Brief submitted by the State of Alabama (Doc. 186), except to the extent their arguments may be construed as in any way inconsistent with the defenses raised by Defendants Barger, Kizer, and the remaining Probate Judges and Absentee Election Managers in their various motions pending before the Court.

Defendants would add that with respect to curbside voting, they adopt the arguments of the State Defendants as asserted in their motion for summary judgment. (Doc. 160, at ECF-26-27). But more broadly, it is entirely unclear to Defendants how curbside voting is supposed to bring about a workable (or safer) solution to the pandemic. Defendants would urge the Court to consider the evidence presented at trial with respect to how curbside voting might work, or not work. Defendants can state with authority that existing polling locations in Madison County are not generally suitable to curbside voting. As just one anecdotal example, one of the defendants' attorneys (David Canupp) regularly votes at Covenant Presbyterian Church on Drake Avenue in Huntsville. Drake Avenue is, at the location of the church, a two-lane road that leads to four schools (two elementary,

waive any arguments in that Motion, nor do they waive other arguments and defenses that they may raise at trial depending upon the facts as they are presented during the course of the trial.

one middle, and one high school). Traffic on this road is abysmal on the best of days, and the thought of allowing hundreds or thousands of motor voters to drive-by vote is alarming, to say the least; in fact, it is likely that implementing this sort of “curbside voting” at locations such as this would *depress* the vote, rather than make the franchise easier to exercise. Although this is just one example, it is an example that repeats itself across Madison County, and, most likely, across the State of Alabama.

Moreover, with respect to curbside voting, it is notable that even one of the epidemiologists retained by the plaintiffs conceded that whether or not curbside voting is safer than in-person voting depends on the number of individuals the curbside poll worker interacts with. There is nothing Defendants can do to minimize the level of interactions poll workers have with others, and in fact, during the election day, poll workers at curbside would in theory interact with hundreds or even thousands of individuals, just as poll workers inside. The hard fact of the matter is that voting in a pandemic – like any other activity during a pandemic – is perhaps less safe than voting in the absence of a pandemic; but that merely proves that pandemics are unsafe. It does not make the State’s typical rules and regulations unconstitutional. And it does not mean that we should radically re-write existing

voting procedures that our voting citizens are familiar with on the very eve of a major federal election.

II. Adoption of the Brief of JoJo Schwarzaur

Defendants Barger and Kizer hereby adopt the Trial Brief submitted by Defendant JoJo Schwazauer. (Doc. 189). As to Section II(a) of that Brief, Defendants adopt the arguments but note that there are no remaining individual plaintiffs who claim to reside or vote in Madison County, Alabama. (Doc. 142). Because none of the remaining plaintiffs live or intend to vote in Madison County, there is no basis for the entry of any relief predicated upon any individual plaintiff (nor is there any argument for organizational standing on the member-standing theory), even if these Defendants had legal authority to ignore the dictates of the State and Secretary of State with respect to voting procedures.

As to Section II(b) of the Schwarzuer Brief, which is adopted as well, Defendants note that the organizational plaintiffs have only identified through hearsay testimony three alleged Madison County residents who have contacted them or reached out regarding the matters raised. Defendants fully reserve the right to challenge these allegations at trial. Furthermore, as to each of those individuals, it is clear that the *cause* of the supposed contact was not any rule, regulation, or law of the State of Alabama, but in fact the co-existence of a pandemic that rendered many

ordinary activities more risky than previous to the pandemic. As noted by the Sixth Circuit Court of Appeals, that fact does not render invalid the existing regulatory and legal rules applicable to voting within this State. See Thompson v. Dewine, 959 F.3d 804, 809-10 (6th Cir. 2020) (noting that plaintiffs were not “excluded” from voting “just because procuring signatures is now harder”). Accordingly, Defendants challenge the standing of the various organizations to sue them.

As to Section III of the Schwazuer Brief, Defendants adopt the arguments in their entirety but hasten to add that this Court has already held that the witness requirement is an essential eligibility requirement. People First of Alabama v. Merrill, No. 2:20-CV-00619-AKK, 2020 WL 3207824, at *23 (N.D. Ala. June 15, 2020) (“Because the witness requirement is deemed a condition precedent to eligibility under state law, and essential eligibility requirements are not subject to reasonable modifications, the plaintiffs cannot state an ADA claim against the witness requirement based on the current record.”). Moreover, the evidence to be presented at trial will show – contrary to the allegations of the complaint, as amended – that the existing photo ID requirement presents no serious barrier to the individuals who may be members of the organizations suing these Defendants. Indeed, many plaintiffs testified that they have the ability to safely copy their photo IDs, and

Secretary Merrill testified that he would even make them a copy himself if they would just email him a photograph.

Furthermore, with all due respect to the Court and its contrary conclusion at the motion to dismiss stage (before Defendants joined the lawsuit), it remains that *all* of the changes proposed by plaintiffs would constitute fundamental alterations of voting in Alabama. See 28 C.F.R. § 35.130(b)(7) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, *unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.*”) (emphasis supplied). This conclusion is inescapable. Indeed, that is why this lawsuit is brought: it seeks a fundamental, permanent change to Alabama’s election structure for *all* voters. It seeks, in a word, to violate Alabama law.² That simply cannot be done

² Not only that, it seeks this massive change on the very eve of an important presidential election, without identifying how this change is to be funded (there is no requirement for any state funding for these changes and none forthcoming, nor is it clear where additional poll workers can be found when even existing workers are having to themselves brave the pandemic to assist); how it can be logistically implemented (most Madison County polling places are churches without ideal traffic patterns surrounding them); how it can be communicated (without unduly depressing the vote and in fact doing exactly the opposite of what plaintiffs claim it will do); how it can be done fairly (without allowing voters in certain counties different voting opportunities than those in counties where no defendants have been joined); and how it can be done without calling into question the integrity of the election itself (which

under the guise of the Americans with Disabilities Act. See, e.g., Doe v. Hous. Auth. of Portland, No. 3:13-CV-1974-SI, 2015 WL 758991, at *6 (D. Or. Feb. 23, 2015), *aff'd*, 644 F. App'x 722 (9th Cir. 2016) (“Plaintiff’s requested accommodation is patently unreasonable because if granted, it would violate federal regulations.”); Assenberg v. Anacortes Hous. Auth., 2006 WL 1515603, at *5, n. 7 (W.D.Wash. May 25, 2006) *aff'd*, 268 F. App'x 643 (9th Cir.2008) (noting that “the ADA and FHA only [require] ‘reasonable’ accommodation, and therefore [do] not require entities to violate federal law as an accommodation”).

III. Reservation of Rights

As noted above, by calling attention to specific arguments, Defendants should not be understood as waiving other arguments, which will be presented at trial. At trial, Defendants anticipate putting on evidence relevant to standing, mootness, feasibility (and lack thereof), outreach, and the division of duties and responsibilities between their positions. Defendants certainly anticipate that there will be additional grounds for ruling in their favor based upon the evidence to be presented at trial.

s/ David J. Canupp

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will be fundamentally changed at the very last minute with no guarantees of perfection or even a full understanding of what set of rules is to be followed since the Court is explicitly asked to re-write existing Alabama statutory law).

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CERTIFICATE OF SERVICE

I certify that I have filed the foregoing with the Clerk of the Court using the ECF System, which will send notification of such filing to those parties of record who are registered for electronic filing, and further certify that those parties of record who are not registered for electronic filing have been served by mail by depositing a copy of the same in the United States mail, first class postage prepaid and properly addressed to them as follows:

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On this the 24th day of August, 2020.

s/ David J. Canupp
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